Supreme Court of the United States

OCTOBER TERM, 1901.

No. 137.

J. C. LEAGUE, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

Error to the Supreme Court of Texas.

Brief and Argument for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a suit, or special judicial proceeding, under and by virtue of the provisions of an act (chapter 103) of the 25th Legislature of Texas, against J. C. League, for the recovery of State and County taxes, interest, penalties and costs, alleged to be due to the State of Texas and the County of San Augustine, for the years from 1884 to 1896 inclusive, on fifteen 640-acre sections, and three fractional sections of land in said County known as Southern Pacific Railroad surveys, and amounting in the aggregate to $1,525.60, which sum is alleged to be a lien on said surveys; and the petition prays for foreclosure of said lien. The defendant's demurrers, general and special, to the petition, were overruled, and the Court, adhering to its rulings on the demurrers and upon evidence which the Court of Appeals holds to have been adequate, gave judgment for the taxes, interest, penalties, cost of sale for

year 1884, and costs of suit, and also for the fees allowed by said act—as costs—to the collector of taxes and county clerk for services in preparation of the delinquent tax lists and delinquent tax records required by said act.

For the convenience of this court, the several sums adjudged respectively as taxes, interest, penalties, fees and cost of sale, have been computed separately, and are shown as follows:

Taxes for the year 1884	$97 56
Interest on 1884 taxes	74 31
Penalty on 1884 taxes	17 07
Taxes from 1885 to 1896 inclusive	723 93
Interest on taxes 1885 to 1896 inclusive	365 23
Penalty on taxes 1885 to 1896 inclusive	103 50
Cost of sale	2 50
Clerk's fees and printer's costs	72 50
Collector's fees	69 00
Total judgment, exclusive of court costs	$1,525 60

Defendant, now plaintiff in error, perfected his appeal to the Court of Civil Appeals of the First Supreme Judicial District, and said court, on the 18th day of January, 1900, holding that the law did not authorize the enforcement of either the 10 per cent penalty, or the taxes for 1884, and that the law did not authorize a personal judgment against the defendant, reformed said judgment in said particulars and rendered judgment in rem, severally, against each of said tracts of land for its respective amount of taxes, interest and cost, and jointly against all of said tracts for the sum of $144.00 printer's, county clerk's and collector's fees, said judgment being for the aggregate sum of $1,232.77; and said judgment also established and foreclosed a lien against each tract for its respective amount of the taxes, interest and costs adjudged against such tract, and a lien collectively against all of said tracts for said sum of $144.00 printer's, clerk's and collector's fees, and directed sale as under execution; first, of each tract to satisfy the taxes, interest and costs adjudged against the same, and thereafter, the sale of all tracts collectively to sat-

isfy said sum of $144.00; also requiring the officer making the sales to place the purchaser in possession within thirty days after sale.

As thus reformed, the judgment of the District Court was affirmed by the Court of Civil Appeals. And, on the 1st day of February, 1900, plaintiff in error filed his motion for a rehearing in said cause, and on the 8th day of March, 1900, said court handed down a supplemental opinion further reforming said judgment, and directing that the writ of possession should not issue thereunder for a period of two years from date of sale, and until further orders of the District Court, and in all other respects overruling said motion.

On the 12th of April, 1900, plaintiff in error sued out a writ of error to the Supreme Court of Texas.

On May 21st, 1900, said court affirmed the judgment of the Court of Civil Appeals, and a motion for a rehearing having been overruled, plaintiff in error, on the 14th day of July, 1900, brought the cause, by writ of error, before this Honorable Court.

Plaintiff in error, by his demurrers to plaintiff's petition in the trial court, and by his assignments of error and his motions for a rehearing in the Court of Civil Appeals and the Supreme Court of Texas, raised, among other questions relating more especially to the Constitution of the State of Texas, the following Federal questions :

1. Whether the guaranty of "Due Process of Law" by the 14th Amendment of the Constitution of the United States is not violated by the act of the Legislature of Texas (chapter 103, General Laws 1897), in so far as said act provides a special judicial proceeding for the condemnation and resale of lands, which had been, prior to passage of said act, sold to the State for the same taxes.

2. Whether said constitutional guaranty of "Due Process of Law" is not violated by said act of the Legislature of Texas (chapter 103, General Laws 1897), in so far as said act creates retroactive charges and fixes a lien retroactively, for interest, and for attorney's, collector's, county clerk's, printer's and

sheriff's fees: Whether said exactions, imposed for the first time and added to the State's claim for taxes assessed and due before the passage of said act, are not in their essential nature ex post facto penalties, or arbitrary exactions imposed on the plaintiff in error, after the extent of his liability had been fixed by the laws in force, when his property was originally assessed against him, or against prior owners.

3. Plaintiff in error. by his motion for a rehearing (Rec., 48), prayed the Supreme Court of the State of Texas to inquire whether said court had not evaded a decision of the foregoing issues in this cause and effectually deprived plaintiff in error of his property, without due process of law, by rendering a judgment in this cause based on a finding that the State had title to the property on which it seeks to foreclose a lien. In other words, whether the judgment in this cause, although regular in form, is not, in reality, an arbitrary edict, based on the court's finding of law and fact, upon an issue of title, when said issue was not raised by the pleadings, and said finding contradicts the allegations of the State petition, to the effect, that the defendant owned the property in question, and the State of Texas had a lien thereon.

SPECIFICATIONS OF ERROR.

FIRST.

The court erred in holding that the plaintiff in error is not deprived of his property without due process of the law of the land by the foreclosure in this suit of the alleged lien and the sale of his property to enforce collection of charges or burdens retroactively imposed by act of the Legislature of the State of Texas (chapter 103, General Laws 1897), under the guise of interest, fees and costs, and added to the delinquent taxes that had accrued prior to the passage of said act.

SECOND.

The court erred in holding that the provisions of said act for the judicial condemnation and resale of land previously sold to the State for taxes, can be enforced against such lands

in the possession of a subsequent purchaser; and that said act does not violate the constitutional guaranty of due process of law in so far as it ignores the legal effect of prior sales and directs a second sale of the land involved in this suit for the taxes for which such lands had been already sold.

THIRD.

The Honorable Supreme Court of the State of Texas has by its ruling and judgment in this suit, if not corrected, deprived plaintiff in error of his property without due process of law, by ignoring the fact, apparent of record, that the charges of interest, fees and costs were retroactively imposed, and sustaining the judgment for said invalid fees, charges, etc., by finding as a conclusion of fact that the State has title to the lands involved, although said finding is not responsive to any issue raised by the pleadings, and is repugnant to the allegations of the plaintiff's petition in the trial court, and to the judgment made and entered in this cause, establishing and foreclosing a lien on the property in question; and although said finding can not be logically or legally deduced or inferred from the defendant's answer in the trial court. (Rec., 55.)

BRIEF AND ARGUMENT.

I.

PROPOSITIONS UNDER SECOND SPECIFICATION OF ERROR.

First—Prior to the enactment of chapter 103 (General Laws of Texas, 1897), the collector of taxes was empowered by law to levy upon and sell, after the first day in January in each year, the lands assessed for taxes for the preceding year.

AUTHORITIES.

Art. 8, secs. 13 and 15, Const. Texas.
Arts. 5176 to 5189, Rev. Stat. Texas, 1895.
McFadden vs. Longham, 58 Texas, 519.

Second—The sales of the lands involved in this case, for taxes, prior to the enactment of chapter 103, Laws 1897, merged the State's lien for said taxes in the estate passed or vested by the sales, and the status of the rights of the State and of other purchasers was fixed by those sales, after which the rights of the State or other purchaser must depend on the legality of the title acquired under the collector's deeds. Any right of a purchaser, at a tax sale, to revive or continue the lien for taxes, must depend on some statutory law of the State, in force and effect when the sales were made.

STATEMENT.

The petition alleges that the lands in question were sold for the taxes due for the year 1884. (Rec., 3.)

AUTHORITIES.

Desty on Taxation, 1011 and 1020.
Robson vs. Osborn, 13 Texas, 307.

Third—The act of the Legislature of Texas, chapter 103 (Laws 1897), is a violation of the constitutional guaranty of due process, in so far as its provisions are intended to avoid the legal effect of a prior sale for taxes, by directing a second foreclosure proceeding for collection of the same taxes.

STATEMENT.

The Federal question, suggested by the 2nd specification of error, was raised by the plaintiff in error (defendant in the trial court), by his 7th Special Demurrer (Record 4), by his assignment of error (Rec., 19), and by his motion for rehearing in Supreme Court of Texas (Rec., 48). Chapter 103 (General Laws Texas, 1897), creates or revives a lien for the taxes, interest, penalties and cost due on all lands that have been returned delinquent or reported sold to the State since January 1st, 1885. Prior to 1897 the charges and costs, added to the tax, upon sale for taxes, amounted to about $3.00 (Rev.

Stat., 5231). The act, chap. 103, sec. 9 (Laws 1897), added to the taxes for the years 1885 and succeeding years 6% per annum interest, together with the following fees: Attorney, $3.00; collector, $1.00; county clerk, $2.00; district clerk, $1.50; sheriff, $1.00; printer, 25 cents; and the act prescribed a special judicial proceeding in the District Court to foreclose the lien for the taxes, interest, penalties and costs. Those parts of said act, which are deemed essential to the determination of the Federal questions, raised in this case, are as follows:

Sec. 2. All lands or lots which have been returned delinquent, or reported sold to the State, or to any or town for taxes due thereon since the first day of January, A. D., 1885, or which may hereafter be returned delinquent or reported sold to the State or to any city or town, shall be subject to the provisions of this act, and said taxes shall remain a lien upon the said land, although the owner be unknown or though it be listed in the name of a person not the actual owner, and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, interest, penalty and costs shown to due by such assessment, for any preceding year.

Sec. 3. It shall be the duty of the Commissioners' Court of each county in this State immediately upon the taking effect of this act to cause to be prepared by the tax collector, at the expense of the county (the compensation for making out the delinquent tax record to be fixed by the Commissioners' Court), a list of all lands, lots, or parts of lots sold to the State for taxes since the first day of January, 1885, and which have not been redeemed, in their respective counties, and unorganized counties attached thereto, and to have such lists recorded in books to be called the "Delinquent Tax Record," showing when the lands or lots were reported delinquent or sold to the State for taxes, also the name of the owner at the time of such sale or delinquency, if known, the numbers of acres, the amount of taxes due when first sold, and the amount of all taxes assessed against the owner thereof and returned delinquent for each year as shown by the records of the tax collector's office.

* * *

Sec. 5. Upon the completion of said Delinquent Tax Record by any county in this State, it shall be the duty of the Commissioners' Court to cause the same to be published in some newspaper published in the county, for three consecutive weeks. * * *

Sec. 6. Twenty days after the publication of such notice, or as soon thereafter as practicable, the Commissioners' Court, or the county judge acting for said court, shall file a list of all lands so advertised for taxes due for any year or number of years, the tax on which remains unpaid, with the county clerk of the county in which such lands are located, or if unorganized, then with the county clerk of the county to which said unorganized county may be attached for judicial purposes, and are to be sold under the provisions of this act, for all the taxes, interest, penalty and costs, and shall cause suit to be filed in the name of the State of Texas, in the District Court of said county, or if unorganized, then, in the District Court of the county to which said unorganized county is attached for judicial purposes, stating therein by apt reference to lists or schedules annexed thereto, a description of all lands or lots in such county upon which taxes and penalty have remained unpaid for any year or number of years since the first day of January, 1885, and the total amount of such taxes, with interest computed thereon to the time fixed for the sale thereof at the rate of six per cent per annum, and shall pray for judgment for the payment of the several amounts so specified therein, and in default thereof, that such lands be sold to satisfy said judgment for all taxes, interest, penalty, and costs, and for such other relief to which the State may be entitled under the law and facts. (All suits to enforce the collection of taxes, as provided in this act, shall take precedence and have priority over all other suits pending in the District Court.) The petition in such suits shall be signed by the attorney bringing the suit, and shall be verified by the affidavit of said attorney, or the county judge, to the effect that the averments contained in said petition are true to the best knowledge and belief of affiant, and the pleadings of the de-

fendant, except those of law, shall be verified by like affidavit of the defendant, his agent or attorney. * * *

Sec. 7. The proper persons shall be made parties defendant in such suits, and shall be served with process, and other proceedings had therein as provided by law for suits of like character in the District Courts of this State; and in case of foreclosure, an order of sale shall issue, and the land sold thereunder as in other cases of foreclosure. * * *

REMARK—Sections 13 and 15, article 8, Constitution of Texas, relating to sales of real estate for taxes, are as follows:

Sec. 13. Provision shall be made by the first Legislature for the speedy sale of a sufficient portion of all lands and other property for the taxes due thereon, and every year thereafter for the sale of all lands and other property upon which the taxes have not been paid, and the deed of conveyance to the purchaser for all lands and other property thus sold shall be held to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud; *provided*, that the former owner shall, within two years from date of purchaser's deed, have the right to redeem the land upon the payment of double the amount of money paid for the land.

Sec. 15. The annual assessment made upon landed property shall be a special lien thereon, and all property, both real and personal, belonging to any delinquent taxpayer, shall be liable to seizure and sale for the payment of all taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.

AUTHORITIES.

Art. 1, sec. 10, ¶1, Const. U. S.
Art. 14, sec. 1, clause 3, Const. U. S.
Art. 1, secs. 16 and 19, Const. Texas.
Art. 8, secs. 13 and 15, Const. Texas.
Arts. 5176 to 5189, Rev. Stat. Texas.
Chapter 103, Gen. Laws 1897, Texas.

Yenda vs. Wheeler, 9 Texas, 408.
Clegg vs. State, 42 Texas; 605.
Meredith vs. Coker, 65 Texas, 31.

Many States of the Union have provided by statute for the enforcement of tax liens, in cases where sales for taxes have been, for any reason, declared illegal. (Desty on Tax., 1011 to 1020.) These acts are prospective, and apply alike to the State and the individual purchasing at a tax sale. They enter into and form a part of the contract, or transaction. Texas has no statute for this purpose, and it is a grave question as to whether the State has any right to assert its claim for uncollected taxes after the lien of the annual assessment, given by art. 8, sec. 15, of the Constitution, has been merged, by a sale by the collector, into the title, good or bad, passed by the sale. Certainly a claim of this character could not be asserted against a subsequent purchaser without notice, or a person claiming a superior outstanding title, and the studied effort manifested in the retroactive features of this act, to enforce a foreclosure, regardless of any "change of ownership," and regardless of any adverse vested rights, shows an utter disregard of the constitutional inhibition against the impairment of vested rights, and a fixed determination to evade the requirement of due process, and by means of a special foreclosure suit for taxes, in which no defense other than payment of the taxes could be urged, to compel subsequent owners to pay the taxes and the penalties and charges which they did not incur, without regard to any defenses, legal or equitable, that could be urged in the District Court in a case within its general jurisdiction.

The petition shows (Rec., 2), that the lands therein described were sold to the State for taxes of 1884; also, that defendant is the owner of said lands, and that he acquired them in 1889 after the sale; also by the exhibits (Rec., 10, et seq.), the lands were not assessed as his property or in his name. From 1876 to 1897 the tax collector had the power, and was enjoined by law, to sell after the first day of January of each year, all lands on which the taxes assessed for the pre-

ceding year had not been paid. (Const., art. 8, secs. 13 and 15; Rev. Stat., arts. 5176 to 5189.

The title passed by a tax sale in Texas is derivative, and the lien is fixed by the assessment. (Yenda vs. Wheeler, 9 Texas, 408; Clegg vs. State, 42 Texas, 605; Meredith vs. Coker, 65 Texas, 31; art. 8, sec. 15, Const.)

A sale passes only the title of the delinquent against whom taxes are assessed, and this act is rendered doubly subversive of the Constitution by the decision of our Supreme Court in this case, holding that the Legislature can and has prescribed a proceeding in rem, by which title can be passed by a foreclosure sale for taxes, without acquiring jurisdiction over the person of the delinquent taxpayer. In this connection we respectfully ask an inspection of the petition, to Supreme Court of Texas, for writ of error. (Rec., 30 to 33.)

II.

The first specification of error (Rec., 54), is submitted as a proposition, as follows:

The court erred in holding that the plaintiff in error is not deprived of his property without due process of the law of the land by the foreclosure in this suit of the alleged lien and the sale of his property to enforce collection of charges or burdens retroactively imposed by act of the Legislature of the State of Texas (chapter 103, General Laws 1897), under the guise of interest, fees and costs, and added to the delinquent taxes that had accrued prior to the passage of said act.

STATEMENT.

The added charges and fees were created by chapter 103 (General Laws, 1897). They are shown in statement (supra) under subdivision I. herein. The charges and fees prior to 1897 amounted to about $3.00. (Rev. Stat., art. 5231.)

AUTHORITIES.

Second and third clauses section 1, 14th Amendment Const. U. S.

Secs. 16 and 19, Bill of Rights, Const. of Texas.

Sec. 6, chap. 103, Gen. Laws 1897.

That interest is not an incident of a tax, and not authorized without statutory authority, see 53 Texas, 157; 55 Texas, 317; 58 Texas, 622; 1 Texas Civ. App., 411; 65 Texas, 619.

As to constitutional law, due process, etc.:

Cooley's Const. Lim., 369 and 353 (star paging).

Chicago, etc., Ry. Co. vs. Chicago, 166 U. S., 226.

Scott vs. McNeal, 154 U. S., 34.

G. C. & S. F. Ry. vs. Ellis, 165 U. S.

Ryan vs. State, 7 Neb., 276.

Camp vs. Rogers, 44 Conn., 291.

State vs. Mayor, etc., 8th Vroom.

ARGUMENT.

Plaintiff in error contends that the act in question, in so far as it seeks to increase the amount due the State for taxes assessed and due prior to the passage of said act by adding charges, under the nomenclature of interest, fees, costs, etc., as above specified, is void. First, because said act is retroactive, and said charges formed no part of the tax, or incident or costs pertaining to such tax when the right of the State to such tax accrued. Second, because said act, in so far as it imposes these charges and directs their enforcement by suit under the semblance of interest, costs of sale and of suit, when in the very nature of things said charges are not and can not be interest or costs of sale or of suit, is an attempt to deprive the citizen of his property without due process of law.

The petition in this case shows that the taxes were all assessed and due and delinquent before the adoption of the act of 1897. Prior to this date there was no law in force charg-

ing the several sums above specified, either against the owner or against his land. Interest is not an incident of a tax, and can not be demanded in the absence of statutory authority. (Cave vs. Houston, 65 Texas, 619; 55 Texas, 317; 53 Texas, 157.)

A retroactive law, general in its application, increasing the costs of court, might perhaps be sustained as pertaining to the remedy, but the sum exacted as interest in this case has nothing to do with the remedy, and the expense incurred by the State in preparing to bring suit, although christened "fees, printer's cost, clerk's cost, etc.," has no relation or connection with the remedy, and formed no part of the collector's costs or costs of sale when the right of the State to these taxes accrued.

While the violation of the Constitution's guaranty, that no person shall be deprived of life, liberty or property without due process of law, has, in a great majority of reported cases, resulted from a departure from the modes of procedure applicable to the particular case under the laws, usages and custom of the country, yet it is well settled that the violation of this guaranty may arise from any unjust act or edict of any branch of the government notwithstanding the fact that such act or edict is being enforced by a judicial proceeding regular in every respect. (Scott vs. McNeal 154 U. S., 34; Chicago, etc., Ry. Co. vs. Chicago, 166 U. S., 226.) The case at bar is, we submit, within the last named category in so far as it provides, under the nomenclature of interest, and the guise of costs, to enforce the collection from defendant, by sale of his land, of sums of money which formed no part or incident of the indebtedness when it accrued, and for which the defendant can not be held personally liable. In the case of Ryan vs. The State, 7 Neb., 276, the statute provided: "That upon all taxes remaining delinquent for the space of one year a penalty of 10 per cent shall attach, which shall be collected by such delinquent tax collector as a part of the tax." An attempt was made to give this act a retroactive effect. The Court says: "This penalty, by the expressed provision of the statute,

becomes an inseparable part or portion of the taxes which were delinquent at the time the act was passed; and in the collection of them it can not be separated from them in violation of the law. Now, it is said that 'penalties may be prescribed for future delinquencies, independent of taxes, as a part of the machinery by which the government is enabled to collect them;' but such penalty is not taxation and can not be sustained as a tax nor any part of the revenue raised by taxation. If, then, such penalty can be enforced, it must be imposed simply as a method or machinery by which the government is enabled to collect future delinquencies in the payment of taxes, and can not be applied or enforced in the collection of taxes previously levied or delinquent, for in such case the law would be retroactive in its operation and can not be sustained; and, therefore, to enforce the penalty will be confiscation and not taxation. It is said that the Legislature can exercise no such function without conflicting with the clause of the Constitution which is intended to guard private rights against oppression, and that even in the absence of any fundamental guarantee, such a use of legislative power would be considered as contrary to the great first principles of the social compact. It is opposed to all reason and justice, and the very nature and spirit of our form of government forbids us to believe that the people intended to entrust the Legislature with any such power. There would be no limitation of the time for which such laws might be made to retroact, or the sums which might be exacted under them, save only the will of the law-maker and the public exigency. Despotism itself could not employ more arbitrary means." Citing, State vs. Mayor, 8th Vroom.

The Legislature of the State, in sec. 13 of the act in question, plainly recognizes the principles enunciated in the foregoing cases, by prohibiting the enforcement of the 10 per cent penalty against delinquents indebted for taxes due before the passage of the law. In no respect does this penalty differ in nature from the sums claimed in the case at bar under the nomenclature of interest, fees, costs, etc. They are charges

created and imposed ex post facto. Interest in its essential nature must enter into and form a part or incident of the debt or obligation when it is created. Imposed retroactively it is not and can not be interest. It is simply a penalty, and the mere fact that it is imposed as a percentage per annum can not make the exaction interest, when, in fact, it was not a legal incident of the debt or obligation when it accrued. The same reasoning applies to the sums claimed as fees and costs. They formed no part or incident of the taxes or of the costs of collecting the taxes when they became due. Under the law, at the time when these taxes became due, the delinquent was liable for the taxes assessed against him, and he could have been made further liable for the costs of sale if the State pursued its remedy of sale by the collector, or, if the State resorted to suit, the delinquent could be held for the customary costs of suit. Any sums exacted retroactively by the Legislature, or by the courts under its authority, call it interest, fees, or penalty, is, we submit, an arbitrary exaction and the taking of property without due process of law.

This constitutional guaranty is ably discussed by the court in Camp vs. Rogers, 44 Conn., 291, as follows: "An act of the Legislature which arbitrarily and without reason makes one person liable for the acts of another, is void, either as against natural justice or as a violation of that article of the Constitution which forbids the taking of any person's property without due process of law. As to the meaning of the expression, due process of law, as used in many of the Constitutions of the States of the Union, Cooley, in his Constitutional limitations, p. 355, says: "We have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principles we are considering, than the following, from an opinion of Mr. Justice Johnson of the Supreme Court of the United States: 'The good sense of mankind has at last settled down to this, that these words were intended to secure the individual from the arbitrary exercise of the power of government, unrestrained by the established principles of private rights and distributive justice.'"

This case is cited for its satisfactory exposition of the meaning of the term "due process." Also to illustrate our contention that this act operates unjustly on the defendant in this cause by compelling him through the instrumentality of the foreclosure proceeding to submit to the exaction of charges under the guise of interest, fees, costs, etc., for which he is not liable, charges which were not a lien or enforceable against his land when he acquired it.

III.

The third specification of error, which is submitted as a proposition, is as follows:

The Honorable Supreme Court of the State of Texas has by its ruling and judgment in this suit, if not corrected, deprived plaintiff in error of his property without due process of law, by ignoring the fact, apparent of record, that the charges of interest, fees and costs were retroactively imposed, and sustaining the judgment for said invalid fees, charges, etc., by finding as a conclusion of fact that the State has title to the lands involved, although said finding is not responsive to any issue raised by the pleadings, and is repugnant to the allegations of the plaintiff's petition in the trial court, and to the judgment made and entered in this cause, establishing and foreclosing a lien on the property in question; and although said finding can not be logicallv or legally deduced or inferred from the defendant's answer in the trial court. (Rec., 55.)

STATEMENT.

Under the laws of Texas, real estate is assessed for taxes each year by entering description and valuation on appropriate rolls and carrying out in appropriate columns the several taxes authorized by law for state and county and school purposes. The taxes being ad valorem, and the rate per centum of the various levies being fixed in advance by law, the tax is computed by the assessor by finding the percentage of the total valuation authorized for each tax. The taxes are due and

payable after October 1st, and they are delinquent after January 1st of each year. The law prior to 1897 provided for annual levy and sale by the collector of taxes. The charge of interest and the various fees enumerated, supra, were not authorized prior to 1897. (See opinion Supreme Court, Rec., 44; Rec., 10 to 18, for copy of "delinquent tax record," made out under chapter 103, Laws 1897, quoted supra.)

AUTHORITIES.

Chicago, etc., Ry. Co. vs. Chicago, 166 U. S., 226.
Scott vs. McNeal, 154 U. S., 34.
Yick Wo vs. Hopkins, 118 U. S., 356.
Burton vs. Platter, 10 U. S. app., 657.

Referred to in support of the proposition, that the constitutional guaranty of due process operates with equal force upon the legislative, judicial and executive departments of government, and upon all agencies by which State law is made and enforced.

Cooley on Tax., 527.
Blackwell on Tax Titles, 527 (3rd ed).
Yenda vs. Wheeler, 9 Texas, 408.
Clegg vs. State, 42 Texas, 605.
Meredith vs. Coker, 65 Texas, 31.

Referred to in support of the proposition that, excepting one or two States where, by organic law, the tax levy, as contradistinguished from the annual assessment, is made a specific and preferred lien on all realty, the effect of a tax sale, through the United States, generally, as well as in Texas, is to pass a derivative title; and the conclusions and rulings of the Honorable State Courts of Texas, whereby a second sale for the same taxes, with added charges, is sustained, under the assumption that the second foreclosure is in the nature of an offer of redemption which the State has a right *to enforce by suit*, are, we respectfully submit, extra-judicial edicts, and in the case at bar, contradictory of the law, the pleadings and the facts shown by the record.

ARGUMENT.

Our State Courts, in disposing of this case, based their decision upon the assumption that the sale of the lands for taxes had vested title to the lands in question in the State of Texas—and that by reason of having title the State could, through the Legislature, with the co-operation of the court in a foreclosure proceeding—force the defendant who acquired the lands after sale, to pay the taxes and the retroactive charges, or give up his land. An inspection of the provisions of the State Constitution, and the Texas cases cited supra, will show conclusively that a sale of land for taxes in this State not not, under the Constitution and laws of this State, operate a forfeiture of the land to the State, and that the sale passes only the title of the delinquent owner or claimant against whom the lands are assessed. It will be noted also that the very act in question, chapter 103, declares that the State has a lien, which is inconsistent with the assumption of the State Courts (Rec., 24 and 44), that the State has title to these lands. The pleadings (Rec., 2 and 3), also contradict this assumption, and show that the State claims a lien, which it seeks to foreclose, and that the defendant is the owner of these lands; and we submit that the conclusion of our Honorable Supreme Court of Texas (Rec., 45), that plaintiff in error, by his pleadings, admitted that the State had title to these lands, is not legally or logically deducible from his answer in the trial court. This answer (Rec., 4 and 5), when taken in its entirety, plainly shows that the defendant, instead of an admission that the State had *title* to these lands, distinctly asserted his ownership by alleging as follows: "And the officers and agents of said State are attempting in this suit and by their demands on this defendant, made under and by authority of alleged laws of said State enacted long after said sales were made, to ignore said sales and avoid the legal effect of said sales, and said State by its pretended legislation and by its officers and agents is endeavoring to deprive this defendant of his said lands acquired by him after said land had been sold

and bought in by said State." The obvious purpose, intent and effect of this answer, especially when read in the light of the demurrers, was to show defendant's contention, that the suit was an attempt to take his property without due process of law, and the allegation, "that said lands had been sold by the collector of taxes of San Augustine county for 1884 taxes and for taxes of subsequent years, and that they have been in every instance bid in by the collector of taxes for the State," was made in connection with the allegation that the agents of the State were "seeking to ignore said sales and to avoid the legal effect thereof" by a second sale of the land in this suit. The allegation of the bare fact that a sale had been made by the collector and the land bid in for the State, could not, if it stood alone, be legally or logically construed into an admission that the State of Texas had title to these lands—a fact which would depend upon the validity of every tax on the rolls, and upon the regularity of every step leading up to the sale.

The distinction between the laws of those States where either a forfeiture, or an extinction of all previous titles is effected, "ex proprio vigore," by the law itself upon the happening of a given event, and those States, where a derivative title passes under a sale for taxes is shown in Cooley on Taxation, 527, and is ably discussed in Blackwell on Tax Titles, 3rd ed., 547, as follows:

"In those States where the tax is a charge upon the land alone, where no resort in any event is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem, the tax deed will undoubtedly have the effect to destroy all prior interest in the estate. * * * In such case the tax law itself is notice to the whole world of the liability of the land for all public assessment, and every one claiming an interest in the land is bound at his peril to pay the tax and thus protect that interest from forfeiture or sale. If he neglects his duty in this respect, his title becomes extinct, and a new and independent title becomes vested in the purchaser, freed from all prior liens, incumbrances upon the

former estate and indeed of every interest carved out of the old fee. The fee of the land passes, and not the interest simbly, of the former owner. All that can be required of the purchaser in such cases is to show title out of the State, prove the regularity of the proceedings and introduce his deed, and he makes out a complete and perfect title to the fee.

"On the other hand, where the law requires the land to be listed in the name of the owner of the fee or of any other interest in the estate—provides for a personal demand of the tax—and in case of default authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax—and in terms or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted—then the sale and conveyance by the officer passes only the interest of him in whose name it was listed, upon whom the demand was made, who had notice of the proceeding and who alone can be regarded as legally delinquent. In such cases the title is a derivative one and the tax purchaser can recover, in ejectment, only such interest as he may prove to have been vested in the defaulter at the time of the assessment. Any other construction of laws containing such provision would be in violation of the spirit which moved the Legislature to enact them and be a means of depriving innocent persons of their estate, persons who had no notice of the proceedings, and who in consequence of this omission can in no sense be delinquent."

The Texas authorities, cited supra, show that only a derivative title is passed by tax sales in Texas, and the same system for the assessment of taxes and the enforcement of the collection thereof has been in force in Texas ever since the adoption of the Constitution of 1845.

Counsel understand the rule to be that this Court will follow the construction placed by the State Courts upon their respective Constitutions and statutes, where such construction does not violate the Constitution of the United States. Also the further rule that this Court will not revise erroneous constructions of the State Courts of their respective State Con-

stitutions, when the Constitution and laws of Congress of the United States are not infringed.

But we respectfully insist that the constitutional requirement of due process, by the Constitution of the United States, will fall far short of its office in protecting the people in life, liberty and property if these rules are extended so as to exclude consideration, by this Court, of an error in the judgment of a State Court, resulting in an arbitrary edict, in a case where said Court has failed or refused to exercise a judicial discretion, and has determined the cause upon a false assumption of law or facts. (Yick Wo vs. Hopkins, 118 U. S., 356; Barton vs. Platter, 10 U. S. app., 657.)

And counsel for plaintiff in error respectfully asks this Court to examine the opinions of the Supreme Court of Texas and the Court of Civil Appeals (Rec., 24 and 44), as well as all other Texas cases that may be cited, for the purpose of determining whether the State Courts have not, in cases where the issue was properly raised, evaded the determination of the question of the illegality of the retroactive charges of interest, attorney's and other fees and costs, specified supra, by holding that the lands sold for taxes from 1884 to 1897 had been forfeited to the State, when the Constitution and the laws of the State and the pleadings all contradict the assumption and show that the only right the State has or can have, is a lien for the unpaid taxes—Whether the interjection of the suggestions or findings, by the Supreme Court, "that the State had title," and by the Court of Appeals, "that the lands had been forfeited," is not such a departure from established rules of procedure and jurisprudence as to render the judgments void (Windsor vs. McVeigh, 93 U. S., 274).

This Court holds, in the last named case, that the striking out of defendant's answer was in effect a denial of a hearing, invalidating the judgment. And in the case at bar, the rulings of the State Courts, that these lands had been forfeited or that the State had title to defendant's lands, is, we submit, tantamount to a refusal to allow him a hearing on this issue of title which was not, and could not be, raised in this case.

In Meredith vs. Coker, cited supra, the Supreme Court of Texas, in construing sec. 13, art. 8, quoted supra, says: "The power to confiscate property by the sanctification of a tax deed does not exist." And we respectfully ask this Court to apply this rule to the opinions and judgments of the State Courts in this case, if, as we contend, said Courts have wrongly assumed that the State had a title to the lands on which the State seeks to foreclose a lien.

Respectfully submitted,

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